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No. OFFICE OF THE CLERK

In The

Supreme Court Of The United States

October Term, 1995

MICHAEL G. MORGAN

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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APP

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether The Court Of Appeals For The Second Circuit's Determination That The Criminal Prosecution Of The Petitioner Following A Civil Settlement Of Claims Relating To The Same Conduct Did Not Violate The Double Jeopardy Clause Conflicts With This Court's Decision In *United States v. Halper*, 490 U.S. 435 (1989)?**

II. **Whether The Methodology Used By The Court of Appeals For The Second Circuit In Determining Whether A Civil Penalty Constituted Punishment Is In Conflict With The Methodology Used By This Court In *United States v. Halper*, 490 U.S. 435 (1989) As Well As By The Court Of Appeals For The Tenth Circuit in *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994)?**

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OCTOBER TERM, 1995

MICHAEL G. MORGAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Michael G. Morgan, respectfully requests that this Court grant a writ of certiorari seeking review of the opinion of the Court of Appeals for the Second Circuit in *United States v. Morgan,* 51 F.3d 1105 (2d Cir. 1995) (*see* Petitioner's Appendix at 1A-22A, hereinafter "Pet. App. ___").

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 51 F.3d 1105 (2d Cir. 1995) and at 57 Cr. L. Rptr. 1049-50 (April 19, 1995). It is reprinted in Petitioner's Appendix at 1A-22A.

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit was issued on April 3, 1995.

The petitioner is relying upon Rules 10 *et seq.* of the Rules of the Supreme Court of the United States in filing this petition.

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 12, United States Code, § 1464(d)(1)(A):

§ 1464. Federal savings associations

(d) Regulatory authority

(1) In general

(A) Enforcement

The director shall have power to enforce this section, section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], and regulations prescribed hereunder. In enforcing any provision of this section, regulations prescribed under this section, or any other law or regulation, or in any other action, suit, or proceeding to which the Director is a party or in which the Director is interested, and in the administration of conservatorships and receiverships, the Director may act in the Director's own name and through the Director's own attorneys. Except as otherwise provided, the Director shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law, or regulation thereunder, in the United States district court for the judicial district in which the savings association's home office is located, or in the United States District Court for the District of Columbia, and the Director may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

Title 12, United States Code, § 1818(b):

§ 1818. Termination of status as insured depository institution

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which [illegible]ed deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed from a date not earlier than

thirty days nor later than sixty days after service of such notice unless an earlier or later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified herein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

.....

(6) AFFIRMATIVE ACTION TO CORRECT CONDITIONS RESULTING FROM VIOLATIONS OR PRACTICES.- The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to -

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if-

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

Title 12, United States Code, § 1818(e):

§ 1818. Termination of status as insured depository institution

(e) Removal and prohibition authority

The text of this statute is set out in the Appendix at 35A *et seq.*

Title 18, United States Code, § 657:

§ 657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with ... a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation, or by the National Credit Union Administration Board or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both;

but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Title 18, United States Code, § 1344:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more that $1,000,000 or imprisoned not more than 30 years, or both.

Title 28, United States Code, § 1254:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....

STATEMENT OF THE CASE

This petition raises a question as to whether the Petitioner's constitutional right against being twice put in jeopardy for the same offense was violated. The Petitioner respectfully submits that by signing a consent order which included a $1.5 million personal obligation in settlement of the civil charges brought against him by the Office of Thrift Supervision constituted a punitive civil sanction, thereby precluding the Government from later indicting him for the same conduct.

On September 22, 1993, the grand jury returned a six count indictment against Michael G. Morgan, the former President and Chief Executive Officer of Charter Federal Savings & Loan Association (hereinafter "Charter Federal"). *United States v. Morgan,* 51 F.3d 1105, 1109 (2d Cir. 1995); Pet. App. at 7A. The indictment alleges violations of two banking statutes, Title 18, United States Code, §§ 657 (misapplication of funds) and 1344 (bank fraud) relating to three separate transactions. *Id.*

Charter Federal was a federal savings association located in Stamford, Connecticut that was organized in 1984. *Id.*, 51 F.3d at 1108; Pet. App. at 3A. Charter Federal created Bedford Equities Corporation (hereinafter "BEC"), a service corporation that was a wholly-owned subsidiary of Charter Federal, for the purpose of acquiring real estate for development and subsequent sale. *Id.*, 51 F.3d at 1108; Pet. App. at 4A. BEC also was the general partner of Bedford Equities 1984 Limited Partnership (hereinafter "BELP 1984") that syndicated real estate acquired by BEC. *Id.* Among the properties acquired by BEC were premises known as 1200 Summer Street, 30

Buxton Farms Road and 159 Franklin Street, all located in Stamford, Connecticut. *Id.*

Prior to the filing of the indictment, Mr. Morgan's activities relating to the purchase and/or sale of 1200 Summer Street, 30 Buxton Farms Road and 159 Franklin Street that are the subject of the charge in the indictment were investigated by the Office of Thrift Supervision (hereinafter "OTS"). *Id.* This investigation resulted in the filing of a Notice of Charges pursuant to 12 U.S.C. § 1818(b)[1] against Mr. Morgan on January 19, 1993. *Id.* On the same date, there were also filed a stipulation of settlement between Mr. Morgan and the Government, and a consent order and consent judgment with respect to the claims contained in the civil charges. *Id.*

The charges in the Notice that are pertinent to the issues raised in this petition involved Mr. Morgan's role in three separate real estate transactions during the period 1984-1987. *Id.* The first charge of the Notice alleged that Mr. Morgan, as Chief Executive Officer and a member of the Board of Charter Federal, voted in favor of extending a loan to BELP 1984 for the purchase of property at 1200 Summer Street in Stamford, Connecticut without disclosing that he would receive $67,500 of a $75,000 brokerage commission paid by BELP 1984. *Id.* The Notice alleged that as a result, Mr. Morgan was unjustly enriched and

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[1] The OTS filed a "Notice of Charges and Hearing for an Order to Cease and Desist and to Direct Restitution and Other Affirmative Corrective Action and Notice of Intent to Prohibit" which also notified Mr. Morgan of their intention to prohibit him from participating in the conduct of business of any federally insured depository institution.

caused loss or other damage to BEC in the amount of $67,500. *Id.*

The second charge asserted that Mr. Morgan improperly structured bank financing for the sale of 30 Buxton Farms Road so as to show a false profit and that he falsely inflated Charter Federal's income. *Id.*

The third charge asserted that Mr. Morgan paid another bank director, through a "straw" broker, a $200,000 commission. *Id.* Additionally, the Notice charged that Mr. Morgan directed that this fee improperly be deferred from 1986 to 1987 to improve Charter Federal's balance sheet for fiscal year 1986. *Id.*, 51 F.3d at 1108; Pet. App. at 4A-5A.

The fourth charge claimed that Mr. Morgan falsely structured the sale of commercial property located at 159 Franklin Street by disguising a $450,000 loan as for "development" of the property when in fact the loan was used as a down payment on the purchase of the property. *Id.*, 51 F.3d at 1108; Pet. App. at 5A.

All of the civil claims the OTS had against Mr. Morgan were settled through the execution of a Stipulation, Consent Order and Consent Judgment. *Id.*, 51 F.3d at 1109; Pet. App. at 5A; *see also* Pet. App. at 23A *et seq.* Mr. Morgan neither admitted nor denied the charges made against him. *Id.* Under the settlement agreement, Mr. Morgan agreed to a consent judgment in the amount of $300,000.00. *Id.*; *see also* Pet. App. at 33A-34A. In addition to the consent judgment, Mr. Morgan agreed to pay the sum of $1,500,000.00 as a personal obligation pursuant to an agreed-upon payment schedule detailed in

the consent order. *Id.*, 51 F.3d at 1109; Pet. App. at 5A-6A; *see also* Pet. App. at 23A, 25A. The relevant portion of the consent order reads:

> a. RESPONDENT shall execute the annexed consent judgment in the amount of $300,000 to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the RESPONDENT in the NOTICE. The OTS may record the judgment against the RESPONDENT but will not execute upon such judgment so long as RESPONDENT complies with the payment schedule set forth in Subparagraph 3.c. below.
>
> b. In addition to the judgment, RESPONDENT also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. This payment obligation is a personal obligation of the RESPONDENT and upon his death will not be an obligation of his estate.

Id., 51 F.3d at 1109; Pet. App. at 6A; *see also* Pet. App. at 25A. Further, the Consent Judgment specified, in part, the following:

> NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff shall recover of the Defendant $300,000 without costs, payable according to the schedule provided in the Consent Order.

See Pet. App. at 34A.

Approximately eight months after the execution of the settlement documents, the Petitioner was indicted and charged with two counts of bank fraud in violation of 18 U.S.C. § 1344 and four counts of misapplying bank funds in violation of 18 U.S.C. § 657 in connection with his conduct in the transactions relating to the properties at 1200 Summer Street, 30 Buxton Farms Road and 159 Franklin Street. *Morgan*, 51 F.3d at 1109; Pet. App. at 7A. All of the criminal charges set forth in the indictment stem from the same events addressed by the January 19, 1993 civil Notice of Charges. *Id.*

Relying upon this Court's decision in *United States v. Halper*, 490 U.S. 435, 448-49 (1989),[2] the Petitioner moved to dismiss the indictment on the ground that it violated his right against double jeopardy under the Fifth Amendment to the United States Constitution. *Id.* Upon the District Court's (Daly, U.S.D.J.) denial of the motion, the Petitioner filed a timely interlocutory appeal in the Court of Appeals for the Second Circuit.[3] *Id.*

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[2] In *Halper*, this Court recognized that a civil penalty may constitute punishment so that double jeopardy would attach in certain circumstances. This Court stated that a civil penalty constitutes "punishment" when it does not serve remedial purposes, but retributive or deterrent purposes. *Halper*, 490 U.S. at 448.

[3] As noted by the Court of Appeals in its opinion, the interlocutory appeal from a denial of a motion to dismiss on double jeopardy grounds is within the collateral order exception to the rule that appeals may be taken only from final judgments. *United States v. Morgan*, 51 F.3d 1105, 1109 (2d Cir. 1995) (citing *Abney v. United States*, 431 U.S. 651, 659 (1977)); *see also* 28 U.S.C. § 1291.

The Court of Appeals for the Second Circuit (Feinberg, Kearse, and Cardamone, Js.) rejected the Petitioner's argument and affirmed the ruling of the district court. *See United States v. Morgan*, 51 F.3d 1105 (2d Cir. 1995) (Pet. App. 1A-22A).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals For The Second Circuit's Determination That The Criminal Prosecution Of The Petitioner Following A Civil Settlement Of Claims Relating To The Same Conduct Did Not Violate The Double Jeopardy Clause Conflicts With Applicable Decisions Of This Court, And Therefore, This Petition For A Writ Of Certiorari Should Be Granted.

In *United States v. Halper*, 490 U.S. 435 (1989), this Court determined that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction if the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, 490 U.S. at 448-9. This Court further stated that:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting, the size of the civil sanction the Government may

> receive without crossing the line between remedy and punishment.

Id., at 449-50.

As noted by this Court in *Halper*, "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.*, at 447 n.7. Therefore, a civil sanction constitutes punishment when the sanction as applied in the individual case serves the purposes of retribution and deterrence, the twin goals of punishment. *Id.*, at 448.

In the present case, the Petitioner was charged by OTS with five counts of violations, unsafe or unsound practices, and/or breaches of fiduciary duty and ordered to cease and desist, direct restitution and other affirmative corrective action, pursuant to 12 U.S.C. §§ 1464(d)(1)(A), 1818(b) and 1818(e). The Petitioner entered into a Consent Order with the OTS, *see* Pet. App. at 23A, which required that the Petitioner pay $1,800,000, delineated as follows:

> a. RESPONDENT shall execute the annexed consent judgment in the amount of $300,000 to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the RESPONDENT in the NOTICE. The OTS may record the judgment against the RESPONDENT but will not execute upon such judgment so long as RESPONDENT complies with the payment schedule set forth in Subparagraph 3.c. below.

> b. In addition to the judgment, RESPONDENT also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. This payment obligation is a personal obligation of the RESPONDENT and upon his death will not be an obligation of his estate.

Pet. App. at 25A (emphasis added). The Consent Judgment specified, in part, the following:

> NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff shall recover of the Defendant $300,000 without costs, payable according to the schedule provided in the Consent Order.

Pet. App. at 34A.

The OTS issued the Consent Order pursuant to Title 12, United States Code, §§ 1818(b) and (e). Subsection (b) permits the OTS "to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued," which includes requiring restitution. 12 U.S.C. § 1818(b)(6) (emphasis added). The Consent Order which was issued by the OTS divided the sanctions imposed upon the Defendant into two separate categories: (1) a judgment of $300,000, which served a remedial purpose "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the [Defendant] in the Notice," and, (2) an additional sum of $1,500,000 which can only represent punishment. By its

plain language, the provision for the $300,000 judgment mirrors the language of 12 U.S.C. § 1818(b)(6).

The Petitioner argued in the district court and on appeal to the Court of Appeals for the Second Circuit that in this case it is not necessary for the Government to do an accounting because it is clear from the language of the Consent Order and the Consent Judgment that the remedial penalty and the retributive penalty were divided into two separate categories: a judgment of $300,000, which served a remedial purpose "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the [Defendant] in the Notice," and "in addition to the judgment," an additional fine of $1,500,000 "as a personal obligation" which represented punishment.

The Court of Appeals for the Second Circuit rejected this argument and held that the Petitioner failed to make a threshold showing that the terms of the civil settlement could be construed as punishment. *United States v. Morgan,* 51 F.3d 1105, 1115-16 (2d Cir. 1995); Pet. App. at 21A-22A. The Court of Appeals accepted the district court's conclusion that the only goal of the OTS civil proceeding was to obtain restitution. This conclusion was based upon two factors: (1) the $1.5 million personal obligation was contained in a subsection of the Consent Order labelled "Restitution"; and, (2) the consent judgment of $1.8 million represented a compromise of the amount the bank lost that reasonably could be attributed to the Petitioner's conduct since no other basis for the

compromise was set forth in the settlement documents. *Morgan,* 51 F.3d at 1115; Pet. App. at 20A-21A.[4]

First, the Petitioner established a threshold showing that the terms of the civil settlement could be construed as punishment based upon the plain language of the Consent Order as discussed *supra*. Additionally, at the time the Petitioner signed the Consent Order, the OTS recognized that he was insolvent. The Consent Order at paragraph 4 provided that: "... the Respondent presently has a negative or insubstantial net worth." Pet. App. at 26A. As recognized by the Court of Appeals for the Second Circuit in *United States v. Mongelli*, 2 F.3d 29, 30 (2d Cir. 1993), "[i]t may be that fines levied upon an individual who lacked access to funds would be considered punitive." Since the Petitioner had a negative or insubstantial net worth at the time he signed the Consent Order, the $300,000 judgment and the $1.5 million personal obligation were punitive on their face.

Secondly, the Court of Appeals' reliance upon the labeling of the $1.5 million personal obligation as restitution in the OTS documents as evidence that the only goal of the OTS civil proceeding was to obtain restitution conflicts with this Court's decisions in *United States v. Halper*, 490 U.S. 435, 448-49 (1989), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945-46 (1994).

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[4] The court's reliance upon this factor is addressed *infra* at 25-29.

In both *Halper* and *Kurth Ranch*, this Court cautioned against relying upon labels in determining whether a civil sanction constitutes criminal punishment. This Court stated:

> This constitutional protection [the Double Jeopardy Clause's proscription of multiple punishments] is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.
>
> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals ... The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

Halper, 490 U.S. at 447-48.

Furthermore, in *Halper* this Court quoted the following language with approval from *Hicks v. Feiock*, 485 U.S. 624, 631 (1988): "The labels affixed either to the proceeding or to the relief imposed ... are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Halper*, at 448 (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)). Likewise, in *Kurth Ranch*, this Court reiterated that "labels do not

control in a double jeopardy inquiry").[5] 114 S. Ct. at 1946.

Therefore, the Second Circuit's reliance upon the fact that the OTS affixed the label of "restitution" to the civil sanction imposed upon the Petitioner is incorrect since labels are not determinative of whether a civil sanction constitutes criminal punishment. The Court must look to the purposes actually served by the sanction. *Halper*, at 447 n.7. In this case, the language and structure of the Consent Order and Consent Judgment clearly earmarked the $300,000 payment as a "judgment" in order "to correct the conditions alleged" -- a remedial measure. On the other hand, the $1.5 million payment was "in addition to the judgment" and designated as "a personal obligation;" in other words, it is retribution and "appears to qualify as punishment in the plain meaning of the word." *See Halper*, 490 U.S. at 449. Since the purpose of the $1.5 million penalty "can not fairly be attributed to remedial purposes, but rather can only be explained as also serving either retributive or deterrent purposes," *see United States v. Certain Real Property And Premises known As 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29, 35 (2d Cir. 1992),[6] the Petitioner made a threshold showing that the

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[5] In *Kurth Ranch*, the United States Supreme Court determined that a tax is not immune from double jeopardy scrutiny simply because it is labeled a tax. *Id.*, 114 S. Ct. at 1946. The Court stated that "...at some point, an exaction labeled as a tax approaches punishment....". *Id.*

[6] *See also United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) ("unless a sanction is solely remedial, i.e., not serving deterrent or retributive ends, it is punishment"); *United States v.*

terms of the civil settlement could be construed as punishment.

As such, the double jeopardy clause of the Fifth Amendment prohibits the Government from criminally prosecuting the Petitioner on the same conduct for which he previously has been punished. Therefore, the Court of Appeals should have reversed the order of the district court and instructed the court to dismiss the indictment, or remanded the case for further proceedings.

This Court should grant the Petition since the Court of Appeals for the Second Circuit decided a federal question in a way that conflicts with this Court's decisions in *United States v. Halper*, 490 U.S. 435 (1989), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

Austin, 113 S. Ct. 2801, 2816 (1993) (relying upon *Halper*, this Court determined the forfeiture was punishment because it did not serve "solely" remedial purposes).

II. The Methodology Used By The Court of Appeals For The Second Circuit In Determining Whether A Civil Penalty Constituted Punishment Is In Conflict With The Methodology Used By This Court In *Halper* As Well As By The Court Of Appeals For The Tenth Circuit In *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), And Therefore, This Petition For A Writ Of Certiorari Should Be Granted.

The Court of Appeal's second ground for concluding that the Petitioner failed to make a threshold showing that the $1.5 million personal obligation constituted punishment was that the consent judgment of $1.8 million represented a compromise of the amount that the OTS claimed that the bank lost due to the Petitioner's conduct. The court also made this determination because there was "no other basis for the compromise ... set forth in the settlement documents." *See Morgan*, 51 F.3d at 1115; Pet. App. at 21A. The court's assumption that the amount of the loss alleged by the OTS in the Notice of Charges ($2,275,000) was the actual amount of the loss is in conflict with the Court of Appeals for the Tenth Circuit's decision in *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), as well as with this Court's decision in *Halper*.

In *Hudson*, the Appellants were indicted for criminal law violations because of their alleged mismanagement and illegal operation of several banks. *Hudson*, 14 F.3d at 538. These violations were based upon the same lending transactions which were the subject of prior administrative sanctions imposed against the Appellants by the Comptroller of the Currency ("OCC")

for violations of various federal banking laws. *Id.* The OCC alleged that the Appellants' violations caused $900,000 in losses. *Id.* The Appellants entered into a Stipulation and Consent Order whereby one appellant agreed to pay $16,000 and the other three appellants agreed to pay $15,000 each. They also agreed not to participate in any banking activities without receiving prior written authorization from the OCC. *Id.*

The district court denied the appellants' motions to dismiss the indictments on double jeopardy grounds, holding that the money sanctions were reasonable and did not constitute punishment. *Id.*, at 539. On appeal, the Tenth Circuit vacated the decision of the district court as it related to the money sanction issue and remanded the case for further proceedings in the district court. *Id.*, at 543.

The *Hudson* court concluded that the district court's determination that the amounts of the fines were reasonable was without any factual support in the record and that the court made no finding as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed. *Id.* Further, the court noted that even if the money sanctions were reasonable, the sanction could still be punitive. The court stated:

> Merely because overly excessive fines may be deemed punitive, *see Halper*, 490 U.S. at 452, 109 S. Ct. at 1904, the converse is not necessarily true, i.e., a money sanction can be reasonably related to one's violations and still be used as punishment. ...
>
> In deciding whether or not the fines are solely remedial, the court must determine the precise

> injury caused to the Government for which the sanctions are the remedy. *See Halper*, 490 U.S. at 452, 109 S. Ct. at 1904 ... If there was no injury to be remedied, then presumably the fines were imposed to deter the Appellants from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable.

Hudson, 14 F.3d at 543. The *Hudson* court ordered that the case be remanded for further proceedings.

The OCC maintained that the appellants' conduct caused approximately $900,000 in losses; pursuant to the Consent Order entered into between the parties and the OCC, one appellant agreed to pay $16,500 while the other appellant paid $15,000. *Hudson*, 14 F.3d at 538. In contrast, in the instant case the OTS alleged a loss of $2,275,000 and pursuant to the Consent Order, the Petitioner is obligated to pay a total of $1.8 million. If the appellants in the *Hudson* case established a threshold showing that the amount paid constituted punishment so as to require a remand for further proceedings, the Petitioner here has likewise met the threshold showing of punishment so as to require a remand to the district court to undertake a double jeopardy analysis.

Further, just as the district court in *Hudson* made a determination that the amounts of the fines were reasonable without any factual support in the record and without determining the amount of the actual losses, both the district court and the Second Circuit in the case at bar found that the $300,000 judgment and the $1.5 million

personal obligation represented a reasonable compromise of the amount lost by the bank without any factual support in the record as to the amount the bank actually lost. Rather, the Second Circuit Court of Appeals speculated that since "[n]o other basis for the compromise is set forth in the settlement documents," the total of $1.8 million must represent a compromise from the amount the bank actually lost.

The Court of Appeals incorrectly accepted the unconfirmed allegations set out in the Notice of Charges that the bank losses were approximately $2,275,000. While this Court recognized that the process of determining the amount of damages the Government suffered "involves an element of rough justice," *see Halper*, 490 U.S. at 449, this Court did not sanction the use of unsubstantiated allegations in determining whether a penalty constituted punishment.

As recognized by this Court in *Halper*, once a previous penalty appears to qualify as punishment in the plain meaning of the word, the defendant is entitled to an accounting of the Government's damages and costs and it is within the court's discretion to determine the basis of such an accounting. *Halper*, 490 U.S. at 449-50. This Court recognized that the case should be remanded for further proceedings so that the Government could provide an accounting.

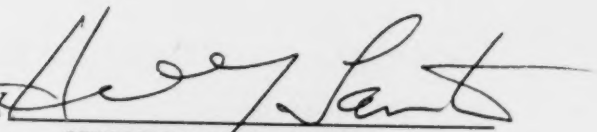
Therefore, just as in *Hudson* and in *Halper*, the Court of Appeals for the Second Circuit should have remanded this case for a determination as to the actual losses incurred, as to who may have suffered the losses, and how they compared to the sanctions imposed.

Accordingly, this Court should grant the Petition since the Court of Appeals for the Second Circuit decided a federal question in a way that conflicts with this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), and with the Court of Appeals for the Tenth Circuit's decision in *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

THE PETITIONER,

BY 

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No. _____

In The

Supreme Court Of The United States

October Term, 1995

MICHAEL G. MORGAN

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 298—August Term 1994

(Argued November 8, 1994 Decided April 3, 1995)

Docket No. 94-1121

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL G. MORGAN,

Defendant-Appellant.

Before:

FEINBERG, KEARSE, and CARDAMONE,

Circuit Judges.

Michael G. Morgan appeals from an order entered in the United States District Court for the District of Connecticut (Daly, J.) on January 21, 1994 denying his

motion to dismiss on double jeopardy grounds an indictment returned against him on September 22, 1993.

Affirmed.

HUBERT J. SANTOS, Hartford, Connecticut (Hope C. Seeley, Santos, Peck & Smith, P.C., Hartford, Connecticut, of counsel), *for Appellant.*

KARI A. PEDERSEN, Assistant United States Attorney, Bridgeport, Connecticut (Christopher F. Droney, United States Attorney, District of Connecticut, New Haven, Connecticut, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

Michael G. Morgan takes this interlocutory appeal from the denial of a motion to dismiss a pending indictment against him entered in the United States District Court for the District of Connecticut on January 21, 1994, before Judge T.F. Gilroy Daly. The appeal raises a question as to whether defendant's constitutional right against being twice put in jeopardy for the same offense was violated. Having signed a consent judgment respecting civil charges brought against him, Morgan now maintains that $1.5 million of the restitution payments imposed on him by the settlement, which sum the con-

sent order labeled a "personal obligation," was in essence a punitive civil sanction precluding the government from later indicting him.

The key word to be understood on this appeal is "punishment." If a person is twice subject to punishment for the same offense, double jeopardy protection attaches. It is our task to determine whether the heavy repayment obligations imposed here do or do not constitute punishment; if they do not, the double jeopardy defense has no application. The Supreme Court gives guidance when it tells us that a civil sanction constitutes punishment when the goal it serves is for purposes of deterrence or retribution. Such goal is evidenced when the sanction is overwhelmingly disproportionate to the damages caused. *See United States v. Halper*, 490 U.S. 435, 448-49 (1989). Thus, an overwhelmingly disproportionate sanction may be present where the civil sanction bears so little relationship to making the government whole as to shock the conscience of the court.

In this case, because there has been no showing of an overwhelmingly disproportionate sanction, the criminal prosecution of Morgan does not offend the Double Jeopardy Clause.

BACKGROUND

Appellant Morgan was a founder, the chief executive officer, and a member of the Board of Directors of Charter Federal Savings and Loan Association (Charter Federal or bank) organized in 1984 and located in Stamford, Connecticut. The bank created a wholly-owned subsidiary called Bedford Equities Corporation to acquire real estate for development purposes. Bedford Equities,

the development corporation, was a general partner of a limited partnership called Bedford Equities 1984 Limited Partnership that syndicated real estate acquired by Bedford Equities Corporation. Among the real estate purchases made by Bedford Equities Corporation were three Stamford properties: 1200 Summer Street, 30 Buxton Farms Road, and 159 Franklin Street.

The Resolution Trust Corporation seized Charter Federal in 1990. Following the seizure, the United States Department of the Treasury's Office of Thrift Supervision (OTS) began an investigation into the activities of certain of the bank's officers and directors. This investigation culminated on January 19, 1993 with the filing against Morgan of a Notice of Charges pursuant to 12 U.S.C. § 1818(b). Simultaneously with the filing of this Notice, there were also filed a stipulation of settlement between Morgan and the government, and a consent order and consent judgment with respect to the claims contained in the civil charges.

The five charges in the Notice involved Morgan's role in four separate real estate transactions during the period 1984-1987. Charge one alleged that when voting to finance Bedford Equities' purchase of 1200 Summer Street, he hid his $67,500 commission on the transaction by the use of a "straw" broker; charge two asserted that in improperly structuring bank financing for the sale of 30 Buxton Farms Road so as to show a false profit, Morgan falsely inflated Charter Federal's income and caused it to lose in excess of $1 million dollars when the purchasers defaulted; charge three involved the same Buxton Farms Road property and charged Morgan with paying another bank director, again through a "straw" broker, a $200,000 commission. It was further asserted in this charge that to improve Charter Federal's books

the payment was ostensibly waived, but in fact was later siphoned into the board member's pocket, disguised as part of a payment to the same "straw" broker on the 159 Franklin Street sale. Count four charged Morgan with falsely structuring the sale of 159 Franklin Street to meet the criteria for profit recognition by disguising a $450,000 loan as for "development" of the property when in fact the loan was used as a down payment on the purchase of the property. The fourth charge claimed loss and other damage to the bank of over $1 million on this transaction. The fifth and final charge involved Lindale Manor, a condominium complex owned by Lindale Partners. It alleged that Morgan caused Charter Federal to make loans to Lindale Partners, a partnership in which he held a one-third interest. Because this conduct was not reflected in the pending indictment, it is not a subject of this appeal. In sum, based upon the first four counts of the Notice, Morgan was charged in all with causing Charter Federal to incur losses in excess of $2,275,000.

Simultaneously with the issuance of the formal Notice of the charges just related, the government notified Morgan pursuant to 12 U.S.C. § 1818(b) that the OTS intended to prohibit him from participating in the conduct of the business of any federally insured depository institution. All of the civil claims the OTS had against Morgan were settled through the execution of the earlier referred to stipulation, consent order and consent judgment.

Under the settlement, Morgan neither admitted nor denied the charges made against him. Pursuant to the settlement agreement, he signed a consent judgment that ordered him to pay $300,000 as restitution to OTS. Under the terms of the consent order, he agreed to pay

$1.5 million to OTS in addition to the $300,000 imposed by the consent judgment. Both sums were to be repaid according to an agreed-upon payment schedule that was made contingent on the extent of Morgan's future gross income. OTS agreed to refrain from executing the judgment so long as the payment schedule was complied with. Morgan has to date made no payments under the settlement.

The relevant portion of the consent order reads:

> *RESTITUTION*
>
> 3. Based upon his sworn statement of financial condition and other relevant factors . . . :
>
> a. RESPONDENT shall execute the annexed consent judgment in the amount of $300,000 *to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations* of law, regulations and rules set forth against the RESPONDENT in the NOTICE. . . .
>
> b. In addition to the judgment, RESPONDENT also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. *This payment obligation is a personal obligation of the RESPONDENT* and upon his death will not be an obligation of his estate.

(Consent Order at 2-3) (emphasis added). The stipulation provides that:

> 11. This STIPULATION and CONSENT, the ORDER, and RESPONDENT'S compliance with the ORDER, do not compromise, settle, dismiss, resolve, or in any way affect:
>
> . . . .

b. any civil or criminal claims, actions, or charges against or liability of RESPONDENT or any other individual or entity asserted by any governmental entity other than the OTS.

(Stipulation at 5).

In September 1993, eight months after the execution of the settlement documents, a Connecticut federal grand jury returned a six-count indictment against Morgan, charging him with two counts of bank fraud, in violation of 18 U.S.C. § 1344, and four counts of misapplying bank funds, in violation of 18 U.S.C. § 657. The charges stem from appellant's alleged misapplication of bank funds with respect to the Summer Street transaction, and his alleged scheme to defraud the bank with respect to the sales of the Buxton Farms Road and Franklin Street properties. All the criminal charges set forth in the indictment stem from the same events addressed by the January 19, 1993 civil Notice of Charges.

Morgan promptly moved to dismiss the indictment as violative of his Fifth Amendment right against double jeopardy. Upon Judge Daly's denial of the motion, Morgan brought this interlocutory appeal. We affirm.

DISCUSSION

Before considering whether the indictment places defendant Morgan twice in jeopardy for the same offense, we note that this interlocutory appeal from a denial of a motion to dismiss on double jeopardy grounds is within the collateral order exception to the rule that appeals may be taken only from final judgments. *See Abney v. United States*, 431 U.S. 651, 659 (1977); *United States v. Amiel*, 995 F.2d 367, 369 (2d

Cir. 1993); *United States v. Helmsley*, 864 F.2d 266, 268 (2d Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). Further, because a motion to dismiss on double jeopardy grounds presents a question of law, we review it *de novo*. *See United States v. Botello*, 991 F.2d 189, 192 (5th Cir. 1993) (review of denial by district court of motion to dismiss indictment on double jeopardy grounds is *de novo*), *cert. denied*, 114 S. Ct. 886 (1994). We turn to the merits.

I Double Jeopardy Waiver

Analysis turns first to whether appellant waived his right to assert a double jeopardy defense to the indictment laid against him. Morgan contends the district court determined in essence that when he entered into the stipulation, consented to the issuance of the order, and signed the consent judgment, he was aware of the possibility of subsequent criminal prosecution, and therefore waived this defense. Although no explicit finding of such a waiver was made, the district judge did point to that language in the settlement documents which stated that Morgan's compliance with the terms of the settlement did not settle, dismiss or resolve or affect in any way any "criminal claims, actions, or charges" asserted by the government against Morgan.

The government believes this language evidences appellant's recognition at the time he executed the settlement documents of the pending criminal investigation. There is no doubt Morgan was aware the United States Attorney's office had been investigating him since 1990. But Morgan does not believe the language of the civil settlement can be construed, following his indictment, as a waiver of his right to raise a double jeopardy defense.

He maintains the cited language simply preserves for the government its right to institute further proceedings against him.

In *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), upon which Morgan heavily relies, the Tenth Circuit held that since a waiver of a constitutional right must be knowing and intelligent, a consent order signed by appellants was too vaguely worded to prevent them from asserting a double jeopardy claim. The order read: "[N]othing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States . . . to bring other actions . . . ." *Id.* at 539. This purported waiver was held ineffective because it did not explicitly state that appellants waived their right to assert a double jeopardy defense were such actions brought. *Id.*

A waiver of a constitutional right must be voluntary, knowing and intelligent, that is, the act of waiver must be shown to have been done with awareness of its consequences. *See Brady v. United States*, 397 U.S. 742, 748 (1970). In examining a purported waiver of the double jeopardy right, we must draw all reasonable presumptions against the loss of such a right. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The purported waiver in Morgan's stipulation did not *explicitly* recognize the renouncement of a double jeopardy defense against future criminal proceedings. *See Hudson*, 14 F.3d at 539. It would have been easy enough for such language to be included in the consent order. In fact, Morgan points out that subsequent consent orders drafted by the OTS—set forth in his reply brief—have included such a specific double jeopardy waiver.

Morgan's conceded knowledge that a criminal investigation was pending against him when he signed the stipulation may not, standing alone, establish that he made a knowing and intelligent waiver of his constitutional right to assert a double jeopardy defense. Because the settlement did not contain language expressly stating that Morgan would be barred from asserting this defense in future criminal proceedings, it could not operate as an effective waiver of Morgan's constitutional right. Were the rule otherwise, the government, when entering into a civil settlement, could safely prevent any double jeopardy defense being raised in a later criminal proceeding simply by advising the putative defendant of the existence of a criminal investigation against him. We reject the notion that a constitutional right may be waived in such an implied fashion.

II Double Jeopardy

A. *History of the Concept*

Analysis turns next to the merits of the motion to dismiss. But before engaging in that discussion, it is useful for purposes of that analysis to make a somewhat detailed examination of the historical development of the Double Jeopardy Clause. That Clause found in the Fifth Amendment to the United States Constitution states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The phrase "life or limb" has a quaintly archaic ring—striking the ear somewhat oddly, perhaps, in its application to a civil sanctions case—yet resonating profoundly with its historical origins.

While the concept of double jeopardy first emerged in the English common law nearly seven hundred years before its adoption in the United States Constitution's Bill of Rights, its roots lie even deeper in antiquity. Known to the Greeks and Romans, *see Benton v. Maryland*, 395 U.S. 784, 795 (1969), the notion of double jeopardy is found in the *Digest of Justinian* promulgated in the year 533, *see* Barry Nicholas, *An Introduction to Roman Law* 48 (Oxford Univ. Press 1962). There the concept is expressed as "The governor should not permit the same person to be again accused of a crime of which he had been acquitted." Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 2 (Cornell Univ. Press 1969) (quoting the *Digest of Justinian*, Bk. 48, Title 2, n.7). The canon law had also long recognized that even God does not punish twice for the same act. *See Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J. dissenting).

These early civil and canon law roots from which, over the centuries, the modern notion of double jeopardy grew began to be evident in the common law of England during the twelfth-century reign of King Henry I (1100-1135), when the need for double jeopardy protection was particularly marked because punishment upon a second conviction for almost any offense was death or mutilation. Hence, the historical derivation of the Fifth Amendment phrase "in jeopardy of life or limb" is from a gruesomely literal source. *See* Sigler, *Double Jeopardy* at 4-5.

The doctrine gained a more secure foothold in the common law during the reign of King Henry II (1135-89), arising out of the king's close relationship to Thomas à Becket, his Lord Chancellor and later Archbishop of Canterbury. Becket, using his high church

office, challenged Henry II's Clarendon Articles, which made the clergy, already subject to trial and punishment in ecclesiastical courts, subject also to being convened before lay judges. *See* Sir Matthew Hale, *The History of the Common Law of England* (Univ. of Chicago Press 1971). The controversy between the two erstwhile friends resulted in Becket's murder, and his subsequent canonization. But in 1176 Henry II conceded St. Thomas' point that "no man ought to be punished twice for the same offense," thereby firmly fixing the notion of no double punishment in the common law. *See* Martin L. Friedland, *Double Jeopardy* 5 (Oxford Univ. Press 1969).

The important aspect of the rule that for modern day purposes limits the sovereign's power to prosecute did not become a feature of double jeopardy in England until the end of the thirteenth century. Prior to that time criminal prosecution frequently depended on suits by private persons. The practice of initiating criminal prosecution by private appeal was a survival of Anglo-Saxon law, and was not wholly abolished in England until 1819. Sigler, *Double Jeopardy* at 8; Friedland, *Double Jeopardy* at 8. During the thirteenth century indictments by the Crown existed in parallel with private prosecutions. Sigler, *Double Jeopardy* at 8. A judgment of acquittal or conviction in a suit brought by a private person barred that person's further suit, and judgment on an indictment by the Crown barred further suit by the Crown. But double jeopardy principles did not prevent the Crown from bringing further suit in cases where a private person's suit had resulted in an acquittal. By the fifteenth century acquittal on a private appeal, after trial by jury, barred indictment by the Crown, and an acquittal on an indictment, generally barred further prosecution for the same

offense by appeal. *See* Friedland, *Double Jeopardy* at 8-9. Thus, the right of private appeal fell into disuse, and repeated prosecution for the same crime began to be eliminated. Sigler, *Double Jeopardy* at 8-9.

The two English common law commentators who most influenced colonial American jurisprudence were Sir Edward Coke and Sir William Blackstone. Blackstone in his Commentaries penned the oft-quoted statement: "The plea of *autrefois acquit*,[1] for a former acquittal, is grounded on the universal maxim . . . that no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 William Blackstone, *Commentaries on the Laws of England* 329 (Univ. of Chicago Press 1979). During the seventeenth century when Coke's writings appeared, double jeopardy began to assume the outline of its present form. *See* Friedland, *Double Jeopardy* at 11. Yet even in the writings of Coke and Blackstone the protection is narrower than in contemporary American doctrine. Sigler, *Double Jeopardy* at 16-17. Coke believed that double jeopardy was not an absolute, but a conditional protection, depending on the quality of the prior acquittal. *Id.* at 18. Blackstone noted that the concept was limited to felonies, and that for the doctrine to apply there was a requirement for either a guilty verdict or an acquittal. *Id.* at 20.

That double jeopardy in America is a more fundamental right than in England may be traced back to early colonial times. The Massachusetts Bay Colony extended its protection to *all* criminal prosecutions and to civil

---

[1] The Supreme Court tells us double jeopardy was historically understood as embracing three common-law pleas—*autrefois acquit*, *autrefois convict*, and pardon—that barred the retrial for the same offense for which defendant had already been acquitted, convicted, or pardoned. *See United States v. Scott*, 437 U.S. 82, 87 (1978).

trespass as well. In New England's first established code of laws, the *Body of Liberties*, that Colony provided: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." *The Massachusetts "Body of Liberties", No. 42, in American Historical Documents, 1000-1904*, at 70, 77 (Harvard Classics ed., P.F. Collier & Son 1910). James Madison, who fathered the doctrine in the Bill of Rights (1791), proposed that it read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." *See* Friedland, *Double Jeopardy* at 28, 30. The Supreme Court later stated as a settled principle of the common law that no person may be twice punished in the same court on the same facts, for the same offense, or "as Coke has it, '*Nemo debet bis puniri pro uno delicto.*' No one can be twice punished for the same crime or misdemeanor . . . ." *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

B. *Modern Jurisprudence*

With this historical background in mind, we address the modern jurisprudence of the doctrine. Today, as its long history makes clear, the Double Jeopardy Clause protects an individual against multiple punishments for the same offense. *See Halper*, 490 U.S. at 440. In modern American law the punishment in question need not be death, maiming or mutilation; nor need the offense be a capital crime or even a felony. The American concept is more generous. It is viewed as an inherent part of our fundamental freedoms that a person accused of any offense, having once suffered punishment, once been convicted, or once won acquittal, is forever immune from further prosecution for that same offense.

Because the concept is so broad, the Supreme Court has held that it applies even to certain fines. A civil sanction may constitute "punishment" for double jeopardy purposes where the sanction is "overwhelmingly disproportionate" to the damages the defendant caused. *See id.* at 449. In such a case, the civil sanction serves not a remedial, but rather a deterrent or retributory function. *Id. Halper*'s test for assessing the nature of civil sanctions is a "rule of reason." *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 34 (2d Cir.), *cert. denied sub nom. Levin v. United States*, 113 S. Ct. 55 (1992).

The double jeopardy inquiry is not concerned with the label of a sanction, but only with whether the characteristics of the sanction are punitive in nature, that is, what purpose they serve. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (tax sanction constituted impermissible second punishment where not rationally related to damages suffered by the government). Thus, we have held that *Halper* does not apply to forfeiture claims. *See United States v. United States Currency in the Amount of $145,139*, 18 F.3d 73, 74-75 (2d Cir.) (the *res* itself, in this case, the money being the culprit, a criminal proceeding *in personam* cannot affect it), *cert. denied sub nom. Etim v. United States*, 115 S. Ct. 72 (1994); *accord United States v. Torres*, 28 F.3d 1463, 1465-66 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994); *but see United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1221-22 (9th Cir. 1994). Defining *Halper* narrowly, we have also declined to apply it to prison disciplinary sanctions, *see United States v. Hernandez-Fundora*, ___ F.3d ___, 1995 WL 62811, at *4 (2d Cir. Feb. 14, 1995) (disciplinary sanctions not punishment where not "grossly dispro-

portionate to the remedial goal of maintaining order and discipline in the prison"); *accord United States v. Newby*, 11 F.3d 1143, 1145-46 (3d Cir. 1993), *cert. denied*, 115 S. Ct. 111 (1994), and to civil contempt fines, *see United States v. Mongelli*, 2 F.3d 29, 30 (2d Cir. 1993) (per curiam) (civil contempt fines of $10,000 per day were coercive and not punitive in nature and therefore not subject to double jeopardy claims under *Halper*).

Where there is no showing of an intent to punish, a court must examine the sanction to see if it serves a legitimate nonpunitive government purpose. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). A line is drawn because civil actions instituted to remedy or recoup financial losses the government has suffered, on the one side, and actions taken to achieve retribution or deterrence in order to uphold public justice, on the other side, are separate and distinct. Unless a sanction serves solely remedial purposes, it must be characterized as punishment. *See United States v. 38 Whalers Cove Drive*, 954 F.2d at 35. While both criminal and civil punishments may lawfully be provided by Congress for the same conduct, it is only the government's action to punish the same conduct on two separate occasions that subjects a defendant to double jeopardy. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943).

III Merits of Double Jeopardy Defense

A. *Preliminary Issues*

We pass now to a discussion of the merits. The Double Jeopardy Clause protects a person from prosecution for the same offense following either an acquittal or a con-

viction, and it protects also against multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Morgan cannot claim prosecution for the same offense arising after an acquittal or conviction because the initial civil proceeding did not result in either. Instead, Morgan avers he is being subjected to multiple punishments for the same offense, citing *Halper*, 490 U.S. at 440.

Before applying the *Halper* analysis to the facts of the instant case, there are two preliminary questions to be addressed. First, the government suggests that appellant's reliance on *Halper* is entirely misplaced because there, contrary to the facts of the instant case, the criminal trial and conviction preceded the attempted imposition of civil penalties for the same conduct. Other circuits have ruled that *Halper* applies when the civil sanction precedes the criminal prosecution. *See, e.g., United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994); *United States v. Sanchez-Escareno*, 950 F.2d 193, 199 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 123 (1992); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.), *cert. denied*, 498 U.S. 865 (1990). We have not explicitly so ruled. *See United States v. Amiel*, 995 F.2d at 370. The district court, persuaded by the reasoning of other circuits, correctly ruled that *Halper* applied to this case.

The recited history of the double jeopardy doctrine in America demonstrates its broad application from the earliest days to civil offenses as well as criminal, unlike in England where, as Blackstone tells us, double jeopardy was only available in a criminal proceeding following an acquittal or conviction. Because of this clearly broadened protection in America, we are firmly persuaded that the shield of double jeopardy remains in place regardless of the happenstance of whether the civil proceeding or

criminal prosecution arising from the same offense comes first. We now rule that such a fortuitous circumstance is of no moment in double jeopardy analysis. In short, double jeopardy protection may be claimed by a defendant whose indictment follows the imposition of a punitive civil sanction for the same offense.

Second, the government also urges that the $1.8 million financial obligation imposed on Morgan is not a civil penalty provided for by statute. Because the OTS had no statutory authority to impose a fine,[2] the payment imposed was, according to the government, not a fine by definition. In its brief, it declares the OTS *could not, and therefore did not* impose a statutory penalty upon Morgan. Therefore, the government concludes, Morgan's repayment obligation is to be construed simply as a personal debt—and a debt does not trigger double jeopardy protections.

We do not think the distinction between a personal obligation negotiated by settlement, and a fine fixed by statute, controls the double jeopardy analysis. As *Halper* noted, "This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual *by the machinery of the state*." 490 U.S. at 447 (emphasis added). In this case, the machinery of the state, as embodied by the OTS, compelled Morgan into undertaking this financial obligation. It is not controlling for analytical purposes whether that compulsion was or was not statutorily authorized.

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[2] The civil penalty provisions available to the OTS today under 12 U.S.C. § 1818(i) did not become effective until the passage on August 9, 1989 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 907(a), 103 Stat. 183, 462-63 (1991).

Even were the government to have acted beyond its authority in punishing an offender against its laws, the protections of the Double Jeopardy Clause are nonetheless triggered when the government acts to punish the same offender a second time. The government's argument boils down to this: if the OTS settlement with Morgan went beyond restitution, then the OTS exceeded its statutory authority in reaching it. We do not think governmental overreaching—if it occurred and if it amounted to punishment—will prevent Morgan from now asserting his constitutional right to be free from a second punishment for the same offense.

B. *Application of* Halper

Having concluded our examination of these threshold issues, analysis now turns to the rules laid down in *Halper*. The Supreme Court teaches that the purpose served by the civil sanction must be ascertained in order to determine whether it constitutes punishment. *See* 490 U.S. at 448-49. Labels such as "criminal" and "civil," "fine" and "repayment" are not controlling. They may not be used to defeat the safeguards guaranteed citizens under the Constitution. *See Kurth Ranch*, 114 S. Ct. at 1946 (label of tax does not end double jeopardy scrutiny because "at some point, an exaction labeled as a tax approaches punishment."); *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The question in each case is whether the sanction does more than merely compensate the government for its damages and costs. Normally the trial court must undertake a rough calculation to determine whether the size of the sanction can be fairly attributed solely to remedial purposes or whether it must be deemed—because of its disproportion in relation to mak-

ing the government whole—also to have been imposed for purposes of punishment. *See Halper*, 490 U.S. at 448-49.

Before undertaking this calculation we note Morgan's contention that it is Charter Federal, not the government, which sustained losses in excess of $2,275,000. The inference he would have us draw is that this figure may not be used in assessing the damage his conduct caused the government. His argument is not persuasive because Charter Federal's seizure by the Resolution Trust Corporation was attributable, at least in part, to Morgan's misconduct. Although the actual losses ultimately sustained by the government are not identical with the harm Morgan inflicted on the bank, the latter figure is a reasonable measure of the portion of the government's damages that have been occasioned by Morgan's actions.

In addition, Morgan claims that in his case no accounting of the government's damages and costs is necessary because the clear language of the consent order and judgment divided the remedial and retributive penalties into two separate categories: a $300,000 judgment "to correct the conditions alleged to have resulted" from his violations of law, and an additional fine of $1.5 million, labeled a "personal obligation." Since only the former is labeled remedial, Morgan insists that the latter larger fine is plainly punishment. Ironically, Morgan's argument depends on the importance of a label, even as he disavows reliance on such tags.

The district court concluded that the only goal of the OTS civil proceeding was to obtain restitution and Morgan's agreement not to further participate in the conduct of the affairs of a financial institution. The trial court based this conclusion on a careful reading of the OTS

documents themselves, which revealed that those documents consistently refer to both of the payments imposed as "restitution." The consent order includes the $1.5 million "personal obligation" as a subsection of Paragraph Three, entitled "Restitution." Elsewhere in the consent order, the payments ordered under that paragraph are referred to as Morgan's "obligation to reimburse against loss."

Moreover, the district court did not simply rely on its own competing assessment of the labels the OTS documents attached to the monetary payments. Judge Daly went on to consider the underlying purpose of the settlement. He found that although the Notice of Charges averred that the bank lost $2,275,000, the consent judgment of $1.8 million represented a compromise of the amount the bank lost that reasonably could be attributed to Morgan's conduct. No other basis for the compromise is set forth in the settlement documents.

A defendant must make a threshold showing of "punishment" before a court undertakes a double jeopardy analysis. *See United States v. Mongelli*, 2 F.3d at 30. In the context of a civil sanction, this threshold is met by showing the sanction to be overwhelmingly disproportionate to the government's damages and expenses. Leeway is given to achieve "rough justice" when computing the precise amount of damages and costs the government suffered. *See Halper*, 490 U.S. at 449; *38 Whalers Cove*, 954 F.2d at 34-35. Only in the rare case where such disproportion is shown does the burden of accounting for its damages and costs fall on the government. *Halper*, 490 U.S. at 449-50. This is not that case. We cannot say that this civil sanction is so divorced from the reality of what the government suffered in damages and expenses as to constitute punishment. *See Halper*, 490 U.S. at 442.

Rather, the dollar amount of the compromise we think falls within the bounds of doing rough justice.

In sùm, appellant has failed to make a threshold showing that any of the terms of the civil settlement could be construed as punishment. Consequently, double jeopardy protection does not attach, and the government could lawfully file an indictment against Morgan after imposing a civil sanction against him for the same conduct.

CONCLUSION

The denial of the motion to dismiss the indictment against defendant Morgan is accordingly affirmed.

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
OF THE DEPARTMENT OF THE TREASURY

In the Matter of	)	
	)	Re: OTS AP 93-7
Michael G. Morgan	)	
	)	Date: January 19, 1993
A Former Officer and	)	
Director of Charter Federal	)	
Savings and Loan Association	)	
Stamford, Connecticut	)	

CONSENT ORDER

WHEREAS, Michael G. Morgan (**"RESPONDENT"**) has executed Stipulation and Consent to issuance of Consent Order (**"STIPULATION and CONSENT"**), which is accepted and approved by the Office of Thrift Supervision (**"OTS"**), acting by and through its Director, Timothy Ryan; and

WHEREAS, RESPONDENT, in the **STIPULATION and CONSENT**, has agreed and consented to the issuance of this Consent Order pursuant to Sections 8(b) and 8 (e) of the Federal Deposit Insurance Act ("FDIC"), 12 U.S.C.A. §§ 1818(b) and (e) (West 1989 and Supp. 1992);

WHEREAS, on _____, pursuant to OTS Order No. _____, the **OTS** approved and issued a Notice of Charges and Hearing to Direct

Restitution and other Appropriate Relief and Notice of Intention to Prohibit **RESPONDENT** from participating in the conduct of the affairs of federally insured depository institutions (**"NOTICE"**);

WHEREAS, RESPONDENT neither admits nor denies the assertions of fact or allegations of unsafe and unsound practices and violations of law, rules and regulations set forth in the **STIPULATION and CONSENT** as such pertain and apply to **RESPONDENT**;

NOW, THEREFORE, IT IS ORDERED that:

1. The **STIPULATION and CONSENT,** attached hereto, is made a part hereof and is incorporated herein by reference.

2. **RESPONDENT** shall cease and desist from:

a. committing, or aiding and abetting the commitment of, unsafe and unsound practices and violations of laws, rules and regulations set forth in the **NOTICE;** and

b. committing, or aiding and abetting the commitment of, any unsafe and unsound practice or any violation of any law, regulation, rule or condition imposed in writing by a Federal regulatory banking agency in connection with the conduct of the business of any federally insured financial institution set forth in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A) (Supp. II 1990) ("insured institution").

RESTITUTION

3. Based upon his sworn statement of financial condition and other relevant factors, including his desire and willingness to cooperate with the **OTS** and to reimburse Charter Federal Savings and Loan Association, Stamford, Connecticut against loss:

a. **RESPONDENT** shall execute the annexed consent judgment in the amount of $300,000 to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the **RESPONDENT** in the **NOTICE**. The **OTS** may record the judgment against **RESPONDENT**, but will not execute upon such judgment so long as **RESPONDENT** complies with the payment schedule set forth in Subparagraph 3.c. below.

b. In addition to the judgment, **RESPONDENT** also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. This payment obligation is a personal obligation of the **RESPONDENT** and upon his death will not be an obligation of his estate.

c. To discharge the judgment and payment obligation specified above, **RESPONDENT** shall make annual payments to the **OTS**, or its successor, or to any entity that they may designate, on each anniversary date of the issuance of the **ORDER** according to the following schedule, until the amounts of $300,000 and $1,500,000 are paid:

(1) five percent (5%) of **RESPONDENT'S** gross income (as defined in the Internal Revenue Code) for the most recent calendar year of $25,000 to $50,000;

(2) ten percent (10%) of **RESPONDENT'S** gross income of $50,001 to $100,000;

(3) twenty percent (20%) of **RESPONDENT'S** adjusted gross income of $100,001 to $200,000;

(4) thirty percent (30%) of the amount by which **RESPONDENT'S** adjusted gross income (as defined in the Internal Revenue Code) exceeds the sum of $200,000 plus the amount of Federal and state income taxes (including FICA) payable by **RESPONDENT** with respect to that adjusted gross income.

FINANCIAL DISCLOSURE

4. Prior to the issuance of this **ORDER, RESPONDENT** provided the **OTS** with the financial disclosure set forth in paragraph 5 below, which was accompanied by his sworn affidavit attesting to the accuracy of his financial disclosure. This disclosure and the accompanying affidavit was expressly relied upon by the **OTS** in agreeing to enter into the **STIPULATION and CONSENT** and the **ORDER.** The information contained in the disclosure demonstrated that the **RESPONDENT** presently has a negative or insubstantial net worth.

5. The financial disclosure of the **RESPONDENT** included (a) a current sworn statement of financial

condition as of _____, 19____, (b) copies of individual income tax returns for calendar years 1988, 1989, 1990 and 1991 and (c) statements detailing each transfer of assets during the period of August 1, 1989, through August 1, 1992, made between, to or from the **RESPONDENT**, his or her spouse, former spouse or any child, including emancipated children, with a total aggregate market value per transfer of $10,000 or more. The statements of financial condition were required to truthfully and accurately disclose all assets, liabilities, and net worth of the **RESPONDENT.** The assets and transfers disclosed included those to which the **RESPONDENT** or members of his immediate family held, conveyed or received legal, equatable, or beneficial title or interest, whether such title or interest is liquidated, inchoate or contingent.

6. The **RESPONDENT** shall, within 15 days of the entry of the **ORDER**, either (a) provide a sworn affidavit under penalty of perjury stating that the previously submitted financial disclosure described in paragraph 5 is still true and correct or, in the alternative, (b) submit financial disclosure, updated to the date of this **ORDER**, of the nature described in paragraph 5 above, accompanied by a sworn affidavit under penalty of perjury that the information contained in such updated financial disclosure is true and correct.

7. Until such time as the amounts set forth in paragraph 3 above are fully paid and satisfied, **RESPONDENT** shall submit, on the anniversary of the issuance of the **ORDER**, to the **OTS**, on such terms and conditions as the **OTS** or its successor may hereafter

require from **RESPONDENT**, the following additional financial disclosure accompanied by a sworn affidavit under penalty of perjury of the **RESPONDENT** stating that the accompanying financial disclosure is true and correct:

a. a current statement of the financial condition, as of the most recent calendar year-end, of the **RESPONDENT,** including consolidated statements of the financial condition of **RESPONDENT** and other parties and a statement of the financial condition of any entity in which **RESPONDENT** held legal, equitable or beneficial title or interest of a 25 percent or greater share;

b. copies of the most recently filed income tax returns of the **RESPONDENT** or any nominee of the **RESPONDENT**;

c. a statement setting forth all transfers since the date of the previous financial disclosure made to or from the **RESPONDENT** or his or her spouse or dependant children from any source that singularly, or when aggregated with other payments from the same source, exceed in market value $10,000 along with a statement setting forth the nature of each such transfer; and

d. a statement of all assets of any nature whatsoever, including gifts and bequests, received by the **RESPONDENT** since the date of the previous financial disclosure made by the **RESPONDENT**, the market value of which exceed by $10,000 or more the amount of any consideration paid by the **RESPONDENT** for the asset. The assets, liabilities and transfers that must be disclosed

pursuant to this paragraph shall include all assets, liabilities and transfers of the nature described in paragraph 5.

8. Solely for the purpose of assessing the accuracy of representations made by the **RESPONDENT** in the financial disclosure required under the **ORDER**, the **RESPONDENT** shall, upon reasonable notice and without service of a subpoena or other process, permit the **OTS** to inspect and copy all books, records, receipts and documentation of any nature whatsoever that he maintains or are under his control that support, document of in any way relate to such financial disclosure. The **OTS** may not request such inspection more than once a year.

PROHIBITION

9. **RESPONDENT** shall not hold any office in or participate in any manner in the conduct of the affairs of institution(s) or other entity(ies), as set forth in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818 (e)(7)(A) without the prior written approval of the Director of OTS, or his designee, and, if appropriate, the approval of other Federal financial institutions regulatory agency(ies). Pursuant to Section 8(e)(6) of the FDIA, 12 U.S.C. § 1818 (e)(6) (Supp. II 1990), conduct prohibited by this **ORDER** includes, inter alia, the solicitation, transfer, or exercise of any voting rights with respect to any securities issued by any insured institution or voting for a director of an insured institution or acting as an institution-affiliated party.

MISCELLANEOUS

10. In any bankruptcy proceeding in which it is or may be contended that **RESPONDENT'S** obligation to make the payment of restitution pursuant to the **STIPULATION AND CONSENT** and the **ORDER** is subject to discharge, **RESPONDENT** will in no manner contest **OTS's** assertions, under 11 U.S.C. § 523(a)(11) (Supp. II 1990) or otherwise, that the obligation is for, and the **ORDER** arises out of, acts that result in claims not dischargeable in bankruptcy in any circumstances, pursuant to any of the provisions of the United States Bankruptcy Code.

11. All payments by **RESPONDENT** required by paragraph 3 of this **ORDER** shall be delivered to:

Comptroller
Office of Thrift Supervision
U.S. Treasury Department
1700 G Street, N.W.
Washington, DC 20552

or as otherwise directed by the **OTS** or its successor in interest.

12. Any financial disclosure by **RESPONDENT** required by this **ORDER** shall be delivered to:

Regional Director
Office of Thrift Supervision
10 Exchange Place, 18th Floor
Jersey City, New Jersey 07302

or as otherwise directed by the **OTS** or its successor in interest.

13. In consideration of **RESPONDENT'S** agreement to comply with this **ORDER**, and inter alia, the recitals set forth in the **STIPULATION and CONSENT**, the **OTS** agrees to (i) dismiss the above-captioned enforcement proceeding against **RESPONDENT** and (ii) forebear from bringing any further enforcement proceedings against the **RESPONDENT** based upon, or arising from **RESPONDENT'S** conduct as an institution-affiliated party of Charter Federal, as that term is defined in Section 3(a) of the FDIA, 12 U.S.C. § 1813(a) (Supp. II 1990).

14. **RESPONDENT'S** obligation to reimburse against loss under paragraph 3 of this **ORDER** is his sole and separate obligation and will not be reduced by payments made to any entity other than the **OTS** or its successor by or on behalf of the **RESPONDENT,** and will not be reduced or subject to an off-set as a result of any payment made by or on behalf of any other person or entity.

15. This **ORDER** is subject to the provisions of Section 8(j) of the FDIA, 12 U.S.C. § 1818 (j) (Supp. II 1990).

16. This **ORDER** shall become effective on the date it is issued.

Approved as to form and content:

_____
John L. Altieri, Jr., Esq.
Attorney for **RESPONDENT**

The Office Of Thrift Supervision

BY: \s_____
Timothy Ryan, Director
Office Of Thrift Supervision

BY: Jonathan Fiechter
Acting Director

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, Plaintiff	:
v.	:
MICHAEL G. MORGAN, Defendant	:

CONSENT JUDGMENT

WHEREAS Plaintiff, the Director of the Office of Thrift Supervision of the United States Department of the Treasury, issued to Defendant Michael G. Morgan a notice of charges and hearing;

WHEREAS Defendant, Michael G. Morgan, has executed a Stipulation and Consent to Issuance of Consent Order (the "Stipulation") (Exhibit 1 hereto and incorporated herein by reference) to settle, without admitting or denying said charges;

WHEREAS Plaintiff, the Director of the Office of Thrift Supervision, pursuant to the Stipulation, has issued a Consent Order (Exhibit 2 hereto and incorporated herein by reference) to Defendant that calls for entry of judgment against Defendant in the manner provided for herein;

WHEREAS this Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. §

1818(i)(1) and personal jurisdiction over Defendant pursuant to his consent;

WHEREAS the Court, having reviewed the Stipulation and Consent Order, finds that judgment should be entered in accordance with the terms of the Consent Order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff shall recover of the Defendant $300,000 without costs, payable according to the schedule provided in the Consent Order.

Consented To:

OFFICE OF THRIFT SUPERVISION
UNITED STATES DEPARTMENT OF
THE TREASURY

By: _____
Jonathan L. Feichter
Acting Director

\s\ _____
Michael G. Morgan

SO ORDERED:

_____
United States District Judge

Dated: January 19, 1993

Title 12, United States Code, § 1818(e):

§ 1818. Termination of status as insured depository institution

(e) Removal and prohibition authority

(1) AUTHORITY TO ISSUE ORDER. - Whenever the appropriate Federal banking agency determines that -

(A) any institution-affiliated party has, directly or indirectly or -

(i) violated -

(I) any law or regulation;

(II) any cease-and-desist order which as become final;

(III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)-

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach-

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) SPECIFIC VIOLATIONS.-

(A) In General. - Whenever the appropriate Federal banking agency determines that-

(i) an institution-affiliated party has committed a violation of any provision of subchapter II of chapter 53 of title 31 and

such violation was not inadvertent or unintentional;

(ii) an officer or director of an insured depository institution has knowledge that an institution-affiliated party of the insured depository institution has violated any such provision or any provision of law referred to in subsection (g)(1)(A)(ii) of this section; or

(iii) an officer or director of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act [12 U.S.C. 3201 et seq.],

the agency may serve upon such party, officer, or director a written notice of the agency's intention to remove such party from office.

(B) Factors To Be Considered. - In determining whether an officer or director should be removed as a result of the application of subparagraph (A)(ii), the agency shall consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

(3) SUSPENSION ORDER.-

(A) Suspension or Prohibition Authorized. - If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under

such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency-

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective Period.- Any suspension order issued under subparagraph (A)-

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f) of this section, shall remain in effect and enforceable until-

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of Order. - If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any

institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting the grounds therefore, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or later date is set by the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. ...

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions,

and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

(6) PROHIBITION OF CERTAIN SPECIFIC ACTIVITIES.- Any person subject to an order issued under this subsection shall not-

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) INDUSTRYWIDE PROHIBITION.-

(A) In general.- Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g) of this section, has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of -

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(iii) any insured credit union under the Federal Credit Union Act [12 U.S.C. 1751 et seq.];

(iv) any institution chartered under the Farm Credit Act of 1971 [12 U.S.C. 2001 et seq.];

(v) any appropriate Federal depository institution regulatory agency;

(vi) the Federal Housing Finance Board and any Federal home loan bank; and

(vii) the Resolution Trust Corporation.

(B) EXCEPTION IF AGENCY PROVIDES WRITTEN CONSENT.- If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of-

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants

such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) VIOLATION OF PARAGRAPH TREATED AS VIOLATION OF ORDER.- Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) "APPROPRIATE FEDERAL FINANCIAL INSTITUTIONS REGULATORY AGENCY" DEFINED.- For purposes of this paragraph and subsection (j) of this section, the term "appropriate Federal financial institutions regulatory agency" means-

(i) the appropriate Federal banking agency, in the case of the insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971 [12 U.S.C. 2001 et seq.];

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act [12 U.S.C. 1752(7)]);

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Board and any Federal home loan bank; and

(v) the Thrift Depositor Protection Oversight Board, in the case of the Resolution Trust Corporation.

(E) CONSULTATION BETWEEN AGENCIES.- The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) APPLICABILITY.- This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that is should apply to a corporation, firm, or other business enterprise.